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No. 73-759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

HON. EDWIN EDWARDS,
Governor of Louisiana, *et al.*,

Appellants,

v.

MARSHA B. HEALY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS

RHONDA COPELON SCHOENBROD
NANCY STEARNS
ELIZABETH M. SCHNEIDER*
c/o Center For Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212) 674-3303
Attorneys for Amicus Curiae

* Ms. Schneider is not yet admitted to the bar.

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MARSHA B. HEALY, ET AL.,

Appellees.

On Appeal From the United States District Court
For the Eastern District of Louisiana

BRIEF FOR AMICUS CURIAE CENTER FOR CONSTITUTIONAL RIGHTS

STATEMENT OF INTEREST

The Center For Constitutional Rights is a non-profit, tax exempt legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Civil Rights Movement in the South, the Center has since that

time included in its legal efforts other groups which have been the subject of systematic and pervasive discrimination.

Since 1969 the Center has devoted substantial energy to the struggle of women to effectuate their constitutional rights to equal protection of the laws and to exercise fully both the rights and duties of citizenship.

As part of its work in connection with several widely publicized criminal cases the Center has challenged jury systems which utilize statutory exemptions and excuses in such a way as to markedly decrease the number of women on juries. Amicus has thereby developed a particular interest in eliminating the present substantial underrepresentation of women in both state and federal juries. Amicus sees the present situation as harmful not only to women whose full participation in society is being discouraged, but also to litigants who must go to trial before a jury which is not a true cross section of the community. Finally, because the jury is the cornerstone of our entire legal system, policies and

practices which taint it harm the entire society. Thus amicus wishes to assist this Court in its examination of the within case in an effort to end the sex-based practices which pervide our jury system.

STATEMENT OF PURPOSE

In the instant case this Court is considering the constitutionality of a statute regulating jury service which can be considered nothing short of a blatantly sex discriminatory anachronism. The state of Louisiana is the only remaining state which requires that women must take the affirmative step of registering with the Clerk of the Court in order to be on a jury. La. Stat. Ann.; Code of Cr. Prac., Art. 402. Louisiana justifies placing this burden on women by asserting that "...woman is still regarded as the center of home and family." Appellants' Brief, p. 7, quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)

Despite the fact that Louisiana is the lone state which places this unique burden on women, the vast majority of states and federal districts use the Louisiana rationale to accord women dif-

ferential treatment by giving them automatic excuses from jury service either for being a woman or for having custody or care of a child.*/ This differential treatment not only results in juries with a disproportionately low number of women but continues the stereotype that a woman's place is in the home. Because the same rationale is used to justify the various forms of differential treatment, any decision by this Court regarding the constitutionality of Section 402 may have tremendous impact on the statutory schemes of most of the remaining 49 states and over 80 federal districts. This is doubly important since many of those schemes are currently under challenge. See for example, National Organization for Women, et al. v. Goodman, 73 Civ. 4831 (S.D.N.Y., April 17, 1974); United States v. Briggs, et al., 366 F.Supp. 1356 (N.D.Fla., 1973). Lest this Court, in ruling on the instant appeal inadvertantly sanction other more subtle forms of discrimination, amicus will attempt herein to assist this Court by placing the narrow question of Louisiana's sex-based filing requirement in the larger context of the many other statutory schemes which provide specialized treatment for women.*/

*/ In fact Louisiana, itself, has an automatic child care excuse for women with children under 16 as well as an affirmative registration requirement. La. Stat. Ann. §403.

SUMMARY OF ARGUMENT

Amicus will survey and analyze all the various state and federal jury selection provisions which embody differential treatment on the basis of sex. Amicus will show that all of these provisions, whether or not they are facially sex-based or linked to the child care function, result in the underrepresentation of women on juries and are sex-discriminatory in violation of Equal Protection of the Laws. Underlying all of these systems is the presumption that a woman's proper and exclusive role and preoccupation is that of motherhood. This reinforces sex-stereotypes and perpetuates the legacy of secondclass citizenship. Stereotypes based on the child care

*/ Since amicus fully supports the arguments presented by Appellees, we will not deal in depth with the Louisiana statute challenged herein but rather consider it as one part of the larger statutory treatment of women.

function traditionally assigned to women are at the heart of the pervasive discrimination against women in this society and are therefore suspect. Strict scrutiny of the presumptions embedded in the differential treatment of women's obligation to do jury service is therefore necessary and appropriate. But even under the more lenient test of Equal Protection applied to gender discrimination, the presumption of hardship is unjustified in light of the fact that the majority of women generally, as well as those with young children, spend their days in the workforce and not at home.

To assure that women are adequately represented on juries and to guarantee them equal protection and due process individualized determination of hardship according to neutral standards is required. Thus a prospective juror - male or female - should be excused only upon an affirmative showing that he/she is necessarily engaged in daily child care and that no adequate alternative care (consistent with the child's needs) is available. Administrative convenience might indeed be served by such an individualized hardship

determination but, in any case, the teachings of this Court reveal that administrative convenience is not a proper basis upon which to uphold such sex-stereotyped exemptions, particularly ones which result in the unwarranted elimination of a cognizable class on our juries.

I. THE SPECIALIZED TREATMENT OF WOMEN EMBODIED IN BOTH STATE AND FEDERAL JURY SYSTEMS VIOLATES EQUAL PROTECTION OF THE LAW.

A. Specialized Treatment Of Women In State And Federal Jury Schemes.

Although jury service is required throughout the United States in both state and federal courts, all of our judicial systems have some mechanism for relieving certain persons or classes of persons from that duty. Those mechanisms are normally termed either exemptions or excuses. They are either categorical in nature, relating to a person's occupation or status,*/ or flow from an individualized showing of hardship. The authority for the latter is either expressly provided in the particular statutory scheme or flows from the inherent power of the court to excuse those individuals for whom jury service would constitute

*/ These occupational classes or groups vary from state to state and district to district but generally include such groups as public officials, police, clergy, attorneys, physicians, dentists, teachers -- if actively engaged in the practice of their professions; persons who have served on a grand or petit jury within the past two years, and persons over 70 years old.

an intolerable burden.

In the vast majority of federal districts and nearly half of the states, women are treated categorically rather than on an individual basis. There are basically four ways in which the federal districts and the states single out women with respect to jury service: 1) requiring that women affirmatively register to be called for jury service; 2) enabling women to remove themselves from jury duty solely on the basis of their sex; 3) relieving women from jury service solely on the basis of child custody and/or care; and 4) maintaining facially sex-neutral automatic excuses for child custody or care, which, will be exercised overwhelmingly by women.

1) Affirmative Registration Required For Women.

Louisiana is the only remaining state with this most extreme provision regarding women, requiring them to come forward and specially register in order to be placed on the jury rolls. La. Stat. Ann. §402. There may however be numerous counties throughout the country which maintain that system as a matter of practice. See for

example, Queens County, N.Y., p. 17, infra.

2) Categorical Excuse For Women.

Five states excuse women solely on the basis of their sex, requiring no showing of hardship whatever. See Appendix A, note 1.

3) Child Care Excuse For Women.

Nine states and more than two thirds of the federal districts grant automatic excuses to women merely on the showing of legal custody or care of a child. The requisite age of the child for the child care excuse varies substantially from state to state and federal district to district, ranging from five years to minority. See App. A, notes 2(a) and (b). The age may even vary from district to district within one state. See for example, California:

> N.Dis. - "Tender years"; Cen. Dis. - 10 years; E. Dis. - 12 years; S.Dis. - 14 years.

4) Sex Neutral Child Care Excuses.

Finally, some few states (three) and federal districts (five) grant categorical excuses or exemptions for child custody or care on a sex neutral basis. See App. A, n.3(a) and (b). It must be recognized, however, that though neutral on

their face, these too will be almost exclusively exercised by women because women are overwhelmingly responsible for child care in our society.

In contrast to these states and the majority of federal districts, thirty-one states plus the District of Columbia and six federal districts have neither special treatment for women nor special excuses for child care. See App. A, n.4(a) and (b). Obviously in these states and federal districts, a woman who would be truly burdened by jury service because of child care or other responsibilities can apply for an individualized hardship excuse.

B. Women, As A Class, Are Not Home-Centered.

All these forms of categorical exemption render jury service voluntary for the defined class. They all reflect the assumption that women are preoccupied with and continually essential to the maintenance of the home and the rearing of children, that the obligation to do jury service would constitute an interruption of home and child care responsibilities, and that such an interruption rises to undue hardship and ex-

treme inconvenience. It is important at the outset that the Court be cognizant of the fact that these assumptions do not coincide with the real life circumstances of a substantial majority of the women entitled to claim these exemptions.

Statistical evidence compiled by the United States Department of Labor illustrates that far from finding their "place" in the home, women are participating in the work force in substantial numbers and that their participation is continually increasing. As of September, 1973, 52.3% of all women between 18 and 64 years old were in the labor force, as compared to 51.1% in September, 1972.*/

Moreover, statistics also demonstrate that in 1973, almost one-half, or 44.1% of women with children under 18 years old were working in the labor force.**/ Of all mothers with children be-

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*/ UNITED STATES DEPARTMENT OF LABOR, WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE (Nov. 1973).

**/ UNITED STATES DEPARTMENT OF LABOR, WOMEN'S BUREAU, Table 2, "Mothers In The Labor Force, By Marital Status And Age Of Children" (Mar. 1973).

tween the ages of six and 17, 68.3% of those who were widowed, divorced or separated (and therefore had exclusive legal custody and primary responsibility for their children) worked, as did 50.1% of those with husbands present. Work force participation of mothers whose youngest child was between the ages of three and five years is also substantial: 54.8% of those widowed, etc., and 38.3% of those with husbands present. Even among mothers whose youngest child was less than three years, 38.5% of those widowed, divorced, or separated, and 29.4% of those living with their husbands were in the labor force.*/

Thus, in 1973, over all the categories discussed, the effect of a child-care exemption for women with young children is unrelated to any unusual hardship in the lives of between 29.4% (mothers of children under three years with husbands present) and 68.3% (widowed, divorced or separated mothers of children between six and 17) of the women it presumes hardshipped. For these

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*/ Id.

women, jury service would not constitute a disruption of a pattern of continuous child care but rather absence from their employment.*/

Furthermore, participation of mothers with young children is continually rising. The percentage participation of mothers with children under 18 has increased five-fold since 1940, rising from 8.6% in 1940**/ to 44.1% in 1973.***/ The same compilations reveal that between 1967 and 1973 this percentage rose from 38.2 to 44.1, constituting a 15.4% increase in labor force participation.****/

Finally, these statistics do not account for all the other mothers of young children who

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*/ The national statistics were borne out in a study of the operation of the automatic excuse for women with custody of children under ten provided by the Jury Plan of the Northern District of Florida, United States v. Briggs, supra. Uncontested statistical evidence compiled on the basis of a random sampling of the jury qualification questionnaires revealed that 48.1% of the women who claimed the excuse were employed outside the home.

**/ DEPT. OF LABOR, WOMEN'S BUREAU, HANDBOOK ON WOMEN WORKERS, Table 17, p. 40 (1969).

***/ "Mothers In The Labor Force, Table 2, supra.

****/ It is significant that the most substantial increases occurred in the category of wom-

(fn. cont. next page)

are away from home because of full or part-time volunteer work. Nor do they account for mothers who, though they do not work, have made*/ or would be able to make alternative arrangements in the community for full-time or after-school care of their children during the normally brief periods required for jury service.

The aforegoing facts demonstrate that categorical treatment of child custody or care as a hardship is completely out of joint with the realities of the lives and needs of the majority of mothers of young children.

(fn. continued from preceding page)

men with children under six years; between 1960 and 1967, the proportion of such mothers working rose from 20% to 29%, (HANDBOOK OF WOMEN WORKERS, supra, Chart 14, p.41), and to 34.2% in 1973, "Mothers in the Labor Force", Title 2, supra.

*/ For example, custodians of children who are away at boarding school, camp or temporarily living with relatives are presently entitled to claim exemption.

II. CATEGORICAL SEX-BASED EXEMPTIONS FROM JURY SERVICE RESULT IN SUBSTANTIAL UNDERREPRESENTATION OF THE COGNIZABLE CLASS OF WOMEN.

It is no longer open to dispute that women constitute a "cognizable class" which must be adequately represented on the jury venire. Healy v. Edwards, 363 F.Supp. 1110 (E.D.La. 1973). See also, White v. Crook, 251 F.Supp. 401 (M.D. Ala. 1960). See also Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pacific Co., 328 U.S. 217 (1945); United States v. Zirpolo, 450 F.2d 424 (3rd Cir. 1971); United States v. Burkett, 342 F.Supp. 1264 (D.Mass. 1972); United States v. Hoffa, 196 F.Supp. 25 (S.D.Fla. 1961) and 28 U.S.C. 1862 prohibiting the exclusion from jury service on the basis of sex.

Amicus contends that the result of the various excuses and exemption from jury service granted to women described heretofore is the substantial, if not gross, underrepresentation of women in the venire.

Statistics available indicate that the

broader the excuse, the more a woman will be encouraged to avoid the responsibilities of jury service, or, to look at the matter from a slightly different perspective, the more she will be discouraged from full participation in civic life in an area which has long been recognized as a "badge of citizenship." Carter v. Jury Commission, 396 U.S. 320 (19). A recent study of jury service patterns in New York City confirms that the underrepresentation of women serving on juries is most glaring under a volunteer system like the one challenged herein. In Queens County, in the City of New York, which also utilizes an affirmative registration system for women, only 3.4% of the jurors were women, while women constituted 54% of the census.*/ In the rest of New York City, which provides an automatic exemption for women, "females are relatively underrepresented by 77.7%," for women comprise only 12.1%

*/ The Juror In New York City: A Survey Of Attitudes And Experiences, The Departmental Committee For Court Administration, Appellate Divisions, First and Second Departments, New York State Supreme Court (1973) p. 105.

of the jurors, although they are again a majority of the population, 54.4%.*/ The majority of women eliminated under both systems are perfectly able to serve, and are no more inconvenienced by such service than the average man who is not excused.

Amicus cannot provide the Court at this time with statistics with regard to underrepresentation of women under either sex-based child custody/care exemptions or facially sex-neutral child custody/care exemptions, for such statistics are not available. Amicus believes, however, that while the results may not be as dramatic, the difference is merely one of degree. For the same problem underlies all such voluntary systems: -- as long as there are automatic excuses available they will be used, since despite its civic importance, jury service is often looked at as an unpleasant responsibility. It is clear that under such systems the underrepresentation would be substantial, and this Court can take judicial notice of the fact that even today, women

*/ Id., p. 8.

are primarily responsible for child care, or perceive themselves as such, although most women are no longer so exclusively occupied. Furthermore, it is not yet socially acceptable for men to claim a child care excuse. Thus even sex-neutral child care exemptions will have the impact of excluding a "cognizable class" from jury service, without any showing of necessity by individual members of the class. Cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

This Court is not without precedent for invalidating presumptions of categorical hardship which result in the underrepresentation of a cognizable class on juries. In Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), the Court struck down an exclusion of daily wage earners which was based on a presumption of financial hardship. This was done notwithstanding the fact that relief from service was intended as a benefit to day laborers. The insistence by this Court that the fundamental nature of jury service and primacy of the representational principle requires that hardship be treated as an individual,

rather than a categorical matter is as applicable to women with child care responsibilities as to day laborers:

> Jury service is a duty as well as a privilege of citizenship; it is a duty which cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear. Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial 'That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatever on this essential right. Steps innocently taken may one by one, lead to the irretrievable impairment of substantial liberties.' Glasser v. United States, supra, 315 U.S. 86, 62 S.Ct. 472, 86 L.Ed. 680." Thiel v. So. Pacific Co., 328 U.S. at 224-5 (1946).

III. DIFFERENTIAL TREATMENT OF WOMEN IN JURY SELECTION VIOLATES EQUAL PROTECTION OF THE LAWS.

The jury systems heretofore described by amicus are all based on the two-pronged notion that woman is properly or necessarily home full-time tending to the needs of her family, and that her participation on the jury is not sufficiently important to require her to serve on an equal basis with men. The difference between those systems which categorically exempt women and those which exempt women with young children is one of degree not of kind.*/ Analysis of the narrow child custody or care-linked exemption for women underscores the sex-discrimination accomplished by the unconditional exemption for women still retained by five states.

The sex-based child care exemption is unrelated to any biological distinction between the sexes. For every woman with a young child, there

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*/ Nor does the emerging trend towards eliminating the facial sex-link from the child care exemption eliminate the sex-discriminatory character of such categorical relief. Rather the Court must pierce the veil of neutrality where the challenged rule has a disparate impact on a protected class. Griggs v. Duke Power Co., supra.

exists a fortiari a man in precisely the same position. Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). Yet proof of the existence of a child of the specified age automatically excuses a woman without further inquiry because child care is presumed to be the woman's function; the man in the identical position, however, is legally obligated to serve as a juror, cf. Danielson v. Board of Higher Education, Civ. Action No. 2985 (1971), unless presumably, he can meet the strict standard of actual hardship which affords a discretionary excuse. Such a differential burden on men and women was struck down as sex-discriminatory in Frontiero v. Richardson, 411 U.S. 677 (1973) where this Court was unwilling to tolerate a presumption of dependency as to wives while requiring proof of dependency of husbands.

Moreover, the categorical child care granted women is infected by yet another layer of stereotypical assumptions. By failing to take account of individual capacity to serve (or inversely the individual hardship which would result from service), these exemptions embody the

presumption that child care responsibilities are all-consuming and mutually exclusive with civic responsibilities.

The stereotypical notions regarding child care described above are at the core of the historical discrimination against women and are part of what have traditionally been considered to be the "unique" difference between men and women -- pregnancy, and the maternal role long considered inseparable from it. Cf. Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141 (1873). Thus in Muller v. Oregon, 208 U.S. 412 (1908), the court declared:

> Differentiated by [her physical structure, the performance of maternal functions and her dependency on men] from the other sex, she is properly placed in a class by herself...208 U.S. 412, 422.

Placed in a "class by herself" because of characteristics considered unique to women and stereotypical assumptions of her maternal role and obligations, she was cast outside the reach of the principle of equality for most purposes until recently. For as Justice Frankfurter stated in holding that women could be excluded from the occupation of bartender, "[T]he constitution does

not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'" Goesart v. Clearsy, 339 U.S. 464, 466 (1948).

The sweeping generalization that women are different because they are "the center of home and family life", Hoyt v. Florida, 368 U.S. 57 (1961) which justified all the legal disabilities under which they labored for centuries, has been progressively narrowed under scrutiny of the relevance of supposed differences to the purposes of legislation. In 1908, the court was able to conclude: "That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious." 208 U.S. 412, 421. Today, it has become apparent that if women are at a disadvantage in the struggle for subsistence it is in large part because of human nature rather than natural laws. As a result, many of the man-made laws have been struck down as violating the Equal Protection Clause. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S.

71, (1971).*/

At the root of recent judicial decisions and anti-discrimination legislation such as Title VII of the Civil Rights Act, is the principle that different benefits and burdens should not be imposed on an individual solely because that individual is of one sex or another. See e.g., Frontiero v. Richardson, supra; Reed v. Reed, supra. The plurality's rationale in Frontiero provides a framework for understanding why, whatever standard of constitutionality is applied,

*/ Brenden v. Independent School Dist., 477, F.2d 742 (8th Cir., 1973) (exclusion of females from high school sports programs); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1972) (excluding females as legislative pages); Bennett v. Dyer's Chop House, Inc., 350 F.Supp. 153 (N.D.Ohio 1972) (exclusion of females from restaurant service); Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 (E.D.Va. 1970) (exclusion of women from state institution of higher education); Seidenberg v. McSorley's Old Ale House, Inc., 317 F.Supp. 593 (S.D.N.Y. 1970) (exclusion of females from service at ale house); Karezewski v. Baltimore & O.R.Co., 274 F.Supp. 169 (D.C.Ill. 1967) (exclusion of widows from coverage for loss of consortium); White v. Crook, 251 F.Supp. 401 (M.D.Ala. 1966)(exclusion of women from juries); Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529, 95 Cal.2d 329 (1971) (exclusion of women from employment as bartenders).

discrimination based on child care obligations should be subjected to the same scrutiny as other sex-based classifications. In reaching the conclusion that sex should be treated as suspect, the Court looked at the historic rationales for discrimination and concluded that sex discrimination was often based on gross stereotypical distinctions between the sexes. The effect of such stereotyping was to relegate women to a second class citizenship without regard to their individual capacities. Frontiero v. Richardson, supra. Compare Reed v. Reed, supra with Reed v. Reed, 93 Idaho 511, 465 P.2d 638 (1970).

Placed in this historical context, it is apparent that classifications based on child care obligations are not separable from sex-based discrimination but are part of a continuum of sex-based discrimination. Women are assumed to be the persons primarily responsible for the care and maintenance of the home and the welfare of children. The stereotypical assumptions that women have one role, family and home, and men have another, business and politics, are at the heart

of all sex-based discrimination. For practical purposes, there is no difference between refusing to permit women to become lawyers because "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother," Bradwell v. Illinois, supra, at p.141, refusing women with pre-school age children employment, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) or allowing women to "volunteer" for jury service on the basis of outmoded stereotypes of maternal obligation.

The "gross, stereotypical distinctions between the sexes," which Justice Brennan notes in Frontiero, supra, at 689, flow from notions about women such as those described above, are at the root of classifications based on child care responsibilities. Not only are women presumed so inconvenienced by child rearing obligations that they cannot serve on juries, but they also cannot work or participate, equally or at all, in the political and economic affairs of the society. Indeed, the very result of such stereotypes is to confine women to the role of housekeeper

and child rearers.

Statutory classifications based on child care obligations frequently bear no relation to an individual woman's ability to perform or contribute to society, her actual employment situation, her ability to arrange for child care outside the home or share child caring functions with her husband. See Danielson v. Board of Higher Education of the City of New York, supra. Such stereotyped characterizations of the "proper domestic roles" of the sexes, Phillips v. Martin Marietta Corp., supra at 545 (Marshall, J. concurring) result in the diminution or termination of women's earning power, denial of benefits available to others similarly situated, thwarting of career goals, and burdening the assumption by women of civic obligations.

Although some may believe that the specialized treatment of women is a benefit,*/ Douglas,

*/ In contrast, in the recent case of Kahn v. Shevin, 42 U.S.L.W. 4591 (April 23, 1974) where this Court upheld differential treatment for men and women, it did so where women were given preferential treatment as reparation for past discrimination, in such a way as not to perpetuate the discrimination.

J., concurring in Alexander v. Louisiana, 405 U.S. 625 (1972) recognized that the Louisiana scheme, far from being a "benign dispensation," operates to exclude women, for "[n]either man nor woman can be expected to volunteer for jury service," supra at 631 . This is equally true of the exemption schemes described above. For as this Court recognized in Thiel v. Southern Pacific Co., supra, to be treated by an unjustifiably lenient standard denies the class of women the right to be treated as equal participants in the administration of justice, "stigmatiz[ing] the whole class, even those who do not wish to participate by declaring them unfit for jury service and thereby putting a brand upon them affixed by law, an assertion of their inferiority." Peters v. Kiff, 407 U.S. 493 , 499 (1972).

The centrality of the child rearing function to society's view of women's proper role and place is at the heart of such sex-based discrimination and makes the child rearing function perhaps the most fertile ground for stereotype and misunderstanding and the last, most stubborn

and intractable bastion of discrimination. The historical pattern which finally necessitated the adoption of the Reed and Frontiero standard of scrutiny in the area of sex discrimination is precisely what compels the application of that standard to child rearing. To exempt child rearing from that standard would be to erect an insuperable barrier to the legal equality of women.

IV. CATEGORICAL EXEMPTION FOR WOMEN BASED ON CHILD CUSTODY OR CARE IS CONSTITUTIONALLY UNJUSTIFIED.

A. The Exemption Is Suspect And Merits Strict Scrutiny.

This Court has traditionally employed a two-tier standard of review in equal protection cases. In cases involving suspect classifications, such as race,* national origin,** or alienage,*** or touching upon fundamental interests, such as the right to travel**** or the right to privacy,***** the Court applies a strict standard of review, requiring the state to establish that the distinctions drawn by the law are necessary to further

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* See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964).

** See, e.g., Oyama v. California, 332 U.S. 633, 644-646 (1948).

*** See, e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971).

**** See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1968); Dunn v. Blumstein, 405 U.S. 330 (1972).

***** See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1964).

an overriding state interest.*/

Whether an automatic child care exemption from jury service accomplishes discriminatory treatment of women by virtue of its facial limitation to or its disparate impact upon women, it should be strictly scrutinized by this Court. The propriety and necessity of strict scrutiny flows from the conjunction here of a sex-based classification which meets all of the Court's established criteria for "suspectness" and the denial effected thereby of the fundamental rights to serve upon and be tried by a representative jury.

As demonstrated heretofore, the exemption of women based on child care responsibilities is effectively a sex-based discrimination which embodies and perpetuates stereotypical presumptions about the incapacity of women as mothers and child carers to assume responsibilities outside the home. As a plurality of this Court held in Frontiero v. Richardson, supra, such sex-based,

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*/ See Developments In The Law - Equal Protection, 82 Harv.L.Rev. 1065, 1087-1131 (1969) (and cases cited therein).

stereotypical classifications must be treated as other suspect classifications:

> [S]ince sex, like race and national origen, is an immutable characteristic, determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." [citation omitted] And what differentiates sex from such nonsuspect statutes (sic) as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. 677, 686.

The plurality's holding coincides with a recent and growing recognition that gender discrimination is as pervasive and costly to society and its disadvantaged members as racial discrimination and requires the same affirmative and stringent measures to eradicate it. Application of strict scrutiny to sex and child care presumptions which serve as a disincentive to women's service on juries is particularly appropriate

since a lesser obligation to fulfill the civic responsibility of jury service is a brand of second-class citizenship.

Indeed, the propriety and necessity of strict scrutiny of such exemptions flows also from the fact that jury service is a "badge of citizenship," in the nature of a fundamental right, which must be accorded and imposed equally on all classes of citizens. Peters v. Kiff, 407 U.S. at 499, supra, Thiel v. Southern Pacific Co., supra. Finally, strict scrutiny of child care exemptions is merited because it infringes the fundamental right of litigants, guaranteed by the Fifth and Sixth Amendments, to trial by a jury drawn from and representing a fair cross-section of the community. Peters v. Kiff, supra, Duncan v. Louisiana, 391 U.S. 145 (1968).

But even should a majority of this Court decline to treat as suspect sex-based classifications like the exemptions discussed herein, they must still be subject to "scrutiny." Reed v. Reed, supra at 75 (1971).

In the area of economic and social legisla-

tion, the Court, investing legislation with a presumption of constitutionality, requires only that distinctions drawn by the challenged statute bear a rational relationship to a legitimate state purpose.*/ While the two-tiered system of review undoubtedly has continuing vitality**/ it appears that the hard dichotomy between strict and minimal scrutiny is undergoing a perceptible softening at the "lower tier."***/ This modification is particularly apparent in cases challenging classifications based on gender, where this Court, in Reed v. Reed, stated that classifications based upon sex:

> must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Id.

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*/ Id.

**/ See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973).

***/ Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 25-33 (1972).

While amicus urges that it is appropriate that categorical child care exemptions from jury service be justified by a compelling state interest, examination of the disparity between the rationale for the rule and the reality of women's status and capabilities demonstrates that such exemptions, which permeate federal and state jury selection systems, fail even under the more lenient test approved by this Court in Reed v. Reed, supra.

B. The Categorical Exemption Bears No Fair And Substantial Relationship To The State's Interest In Relieving Prospective Jurors Of Service Where Undue Hardship Would Result.

As appellees have made clear, the justification for categorical exemption could no longer be that child care should be a full-time preoccupation for women but rather that the particular responsibilities entailed therein renders jury service an undue hardship and extreme inconvenience.

Amicus does not take issue with the notion that real hardship or inconvenience to the community or to the individual prospective juror

should be recognized as a valid basis for relief from the duty to serve. We do not dispute the permissibility of allowing automatic excuse or exemption to persons actively engaged in certain occupations whose continuing services are essential to the health and welfare of the community.*/ Nor do we dispute that where uninterrupted care by the prospective juror is indispensable to the welfare of another person in a state of dependency, relief from service is appropriate. Clearly the dependency of a small child may be such a circumstance justifying a hardship excuse.

The problem with the majority of the statutory or judicial schemes that invite exemption where the prospective juror is a woman and/or has custody and/or care of a young or minor child is that hardship is presumed, rather than individually determined.

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*/ Exemption of these groups does not suffer the same constitutional infirmities that infect the exemptions for women. They do not operate to eliminate a cognizable class; they are based on a real or likely unavailability; and they do not bestow a badge of second-class citizenship.

1. Categorical Treatment Of Women As Hardshipped Is Overinclusive And Irrational.

The presumption of hardship accorded women or women with young children in unfounded in fact. It assumes women to be the exclusive childrearers in this society. Examination of the realities of the life circumstances of this class reveals the fallacy of the sex-stereotypical assumptions upon which the presumption is based. The rationale, therefore, completely fails to support the rule.

First, it is clear that statutes such as the one under review or those which simply exempt women, for which child and home care are the asserted rationale, sweep excessively broadly in that they presume that all women no matter their age, parental, marital, or employment status would suffer hardship at serving on juries.

Even jury selection systems that confine the exemption to women with custody or care of children under a specified age suffer from an analogous overinclusion. They embody the presumption that child custody or care is an all

consuming preoccupation of women which precludes equal undertaking of civic responsibility and obligations. In Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186, 4192, in striking down a prohibition on women returning to work until after their newborn child reached the age of three months, this Court rejected the assumption that mothers of infants are too preoccupied with their care to return to work:

> Of course, it may be that the Cleveland rule is based on another theory -- that new mothers are too busy with their children within the first three months to allow a return to work. Viewed in that light the rule remains a conclusive presumption that can hardly be said to be universally valid. Id., fn. 15.

The presumption here is far from universally valid. The substantial participation of mothers of even the youngest children in the work force reveal this presumption to be founded on stereotypical thinking rather than on the realities of the demands on women entailed by child custody and care. See Point I, B., supra.*/

*/ The irrationality of these child care exemptions is underscored by the tremendous diversity of age limits, ranging from 5 years to the age of majority based on no discernable demogra-

(fn. cont. next page)

In fact, a near majority of all women with children under 18 are in the same position as men, who by the sheer fact of employment and parenthood are not presumed hardshipped by the obligation to do jury service. Moreover, treatment of child custody and care as hardship becomes yearly more overinclusive and irrational since, as we have shown, the percentage of working mothers of young children rises each year.

2. Individualized Determination Of Hardship For Child Care Is The Only Reasonable And Permissible Method Of Excuse.

The State's interest in providing relief from service where true hardship and inconvenience would be suffered by the prospective juror - male or female - would be satisfied by individualized determination of hardship based on an affirmative showing that the person claiming excuse is in fact engaged in daily caretaking responsibilities and that adequate and feasible al-

(fn. cont. from preceding page)
phic differences. See App. A., notes 2(a) and (b).

ternative child care arrangements, taking into account the young child's needs, are not otherwise available for the proposed term of service. Such a standard avoids stereotypical assumptions and comports with the hardship standard generally applied without sacrificing the flexibility necessary to encompass a young child's special needs for continuous care as well as any special difficulties entailed in finding alternative care.

The rationale of classification required by the Constitution demands no less than such a neutral and exacting treatment of child care as a hardship. Merely to eliminate the facial sex discrimination that pervades the selection schemes does not eradicate the sex-discriminatory effect of treating child care as a categorical exemption. In recent years, this Court has consistently invalidated rules and regulations which embody stereotypical conclusive as well as rebuttable presumptions that sweep broadly beyond the interest they were designed to serve, be it under the rubric of due process,

Cleveland Board of Education v. LaFleur, supra; Stanley v. Illinois, 405 U.S. 645 (1972); or under the rubric of equal protection, Cleveland Board of Education v. LaFleur, supra at 4192, (Powell, J., concurring); Frontiero v. Richardson, supra; Stanley v. Illinois, supra at 658-659; Reed v. Reed, supra.

Administrative convenience cannot save such overinclusive and sex-discriminatory schemes. As the Chief Justice wrote in Reed v. Reed:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearing on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment....Id., at 76.

See also, Frontiero v. Richardson, supra. Moreover, in this context any argument concerning administrative inconvenience is virtually de minimis. On the basis of the statistical evidence of work force participation of mothers of young children, it can be estimated that approximately one-half of the women who now are entitled to claim exemption for child care or

custody would have no basis for claiming excuse. The necessity of making the affirmative showing of unavailability of adequate alternative child care arrangements would discourage another substantial proportion of the presently eligible population from seeking excuse. The disposition of the remaining few who would seek excuse with each call to serve could consume no more than minutes of the clerk of the court's time, less time perhaps than that involved in processing the larger numbers of prospective jurors now required to account for the anticipated drop-out rate permitted by categorical treatment. Indeed, the fact that 38 states and 6 federal districts have no categorical exemption attests to the eminent workability of a neutral and discretionary hardship system.

The teaching of Thiel v. Southern Pacific Co., supra, that excuse for hardship must be given individualized treatment is thus as applicable where, as here, to do otherwise would result in the under representation of a cognizable class by option of its members as it was

there where a practical exclusion resulted. Official largesse which perpetuates the stereotypes of the past can be no justification for the discrimination that results.

For all the aforegoing reasons, it could not be argued that a categorical exemption meets the test of fair and substantial relationship to a legitimate state objective, let alone the more appropriate and stringent compelling state interest test.

CONCLUSION

WHEREFORE, amicus urges that this Court affirm the decision of the Court below, and, in so doing, take cognizance of the unconstitutionality of the categorical exemptions discussed herein to the end that the underrepresentation of women on juries and the badge of second-class citizenship which these exemptions perpetuate be swiftly eradicated.

Respectfully submitted,

RHONDA COPELON SCHOENBROD
NANCY STEARNS
ELIZABETH SCHNEIDER*/
c/o Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212)674-3303

Attorneys for Amicus Curiae

Dated: New York, N.Y.
May 7, 1974

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*/ Ms. Schneider is not yet admitted to the bar.

The attorneys acknowledge the excellent contribution of Laura L. Jacobson, Joan Levy, and Anita S. Nielsen, students at the Brooklyn Law School.

Appendix A

#1. Automatic Excuses for Women

Missouri, Ann.Stat. 494.031: New York, Const.Laws of N.Y. Judiciary, §22-101: Alabama, Code of Ala. Title 30 §21 (where good cause must be shown). Gen.Law. R.I. 9-9-11; Tenn. Stat. 22-101.

A sixth state, Georgia also excuses "any woman, teacher or principal." Georgia Stat.Ann. §59- 112(d). It is not clear from the face of the statute, however, whether this grants an excuse to all women or to all women who are teachers or principals.

In addition, there are miscellaneous excuses or exemptions granted only to women such as Florida's exemption for pregnant women, Fla. Stat.Ann. §4001 and Massachusetts which exempts any woman "...upon her representation... that she would be likely to be embarrassed by hearing the testimony or discussing the same in the jury room." Ann. Laws of Mass. C.234 §1A.

Finally, in Nebraska and Rhode Island women are called for jury service only after there has been a finding of facilities for them. Rev. Stat.Nebr. 25-1601.01: Gen.Laws of R.I. 9-9-11.

#2. Child Care Excuses for Women

a) State

Under 7 - South Carolina, Code of S.C., §38-108:
Under 10- Texas Civ.stat.of Tex.Ann. Title 42; At. 2135(2)
Under 15 (housewife) - Georgia; Ga.Stat. Ann. 59-112(b):
Under 16-Connecticut, Conn.Gen.Stat. 51-218
Massachusetts, Ann.Laws of Mass., Ch. 234 §1
Louisiana, La.Stat.Ann. Art. 403
Under 18-Florida, Fla.Stat.Ann. §40.01

Minor children-Oklahoma-Okla.Stat.Ann. Art. 38 §28
Utah-Utah Code Ann. §78-46-10

In addition, in Nebraska, Nebr.Rev.Stat. 25-1601.02; and Wyoming, Wyo.St.Ann. §1-80, women can be excused if conditions in her home or her household duties would constitute a hardship.

b) Federal

Under five years (1): P.R.
Under seven years (2): W.Va.,N; W.Va.,S; Alaska; Cal.,C; Canal Zone; Colo.; Fla.,S; Fla.,M; Fla.,N; Ga.,N; Ga.,M; Ga.,S; Idaho; Ill.,E; La.,E; La.,W; La.,M; Minn.; Miss.,S; D.C.; Nebr.; Nev.; N.Y.,N; N.Y.,S; N.Y.,W; N.C.,W; N.Dak.; Ohio,N; Ohio,S; Okla.,N; Okla.S; Okla.,W; Ore.; Pa.,M; Pa.,W; S.Dak.; Tenn.,M; Tenn.W; Tex.,N; Tex.,S; Tex.,W; Tex.,E; Utah; Va.,W; V.I.; Wash.,E; Wisc.,W; Wyo.
Under twelve years (7): Cal.,E; Conn.; Haw.; Md.; SCar.; Va.,E; Wisc.,E.
Under 13 years (1): N.Mex.
Under 14 years (3): Cal.,S; Ill.,N; Ind.,S.
Under 15 years (1): Colo.
Under 16 years (6): Ariz.; Kan.; Me.; N.Y., E; Pa.,E; R.I.
Below high school (1): Mont.
Children of tender years (1): Cal.,N.

Six districts use a somewhat stricter standard as for example Wash.,W., which only grants an excuse where the woman does not have adequate domestic assistance to help with the care of her child. See also Ill.,S; Ind.,N; Mich.,W; Mo.,W; and Mo., E.

#3. Sex Neutral Child Care Excuses

a) State:

Under 16 - Virginia, Va.Ann.Rev.Code, 8-208, 6 (26);
Minor Child - New Jersey, N.J.Stat.Ann. 2A-69-2(g);
Child of any age - Montana, Mont.Rev. Code 93-1304(12).

b) Federal:

(This provision also relates to care or custody of another person unable to care for himself or herself due to illness or physical or mental disability)

Ky.,W; Mass.; Mich.,E; N.H.; N.J.

#4. No Categorical Treatment for Women or Child Care

a) State:

Alaska; Ariz.; Ark.; Calif.; Colo.; D.C. (here we refer to the local D.C. courts, not the Federal District Court); Del.; Hawaii; Idaho; Ill,; Ind.; Kan.; Ky.; Maine; Md.; Mich.; Minn.; Miss.; Mont.; N.H.; N.Mex.; Nev.; N.Car.; N.Dak.; Ohio; Ore.; Pa.; S.Dak.; W.Va.; Wash.; Wisc.

b) Federal:

Guam; Ky.,E; Miss.,N; N.Car.,N; N.Car.,E; Vt.

CERTIFICATE OF SERVICE

The undersigned attorney and member of this Court hereby certifies that she did cause copies of the foregoing Brief Amicus Curiae to be served by U.S. Mail, First Class, Postage Prepaid, upon the following counsel for Appellants and Appellees:

William J. Guste, Jr.
Attorney General of Louisiana
P.O. Box 44005
Baton Rouge, Louisiana 70804

Ruth Bader Ginsburg
Melvin L. Wulf
Kathleen Peratis
American Civil Liberties Union
22 East 40th St.
New York, N.Y. 10016

George M. Strickler
344 Camp Street
Suite 1100
New Orleans, Louisiana 70130

this 7th day of May, 1974.

NANCY STEARNS